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No. 96-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF PETITION

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MOTION OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Port Authority of New York and New Jersey ("Port Authority") respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The application is made pursuant to Rule 37.2(b) of the Rules of the Supreme Court. Consent to the filing of the brief *amicus curiae* has been received from the attorney for the Petitioner, but not from the attorney for the Respondent.

The applicant, the Port Authority, is a body corporate and politic created in 1921 by a Congressionally-consented-to compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws Ch. 151 and 1921 N.Y. Laws Ch. 154. The Compact is codified at N.Y. Unconsol. Law §§6401-23 (McKinney 1979). At the present time, pursuant to the 1921 Compact, and subsequent bi-State legislation, the Port Authority owns and/or operates thirty-three (33) such facilities, including, through its wholly-owned subsidiary, the PATH interstate railway system. N.Y. Unconsol. Law §6612 (McKinney 1979).

The operation of the PATH system is regarded as an essential governmental function for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Law §6610 (McKinney 1979). Through its operation of the PATH system, the Port Authority is often a defendant in cases brought pursuant to the statute at issue, the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51. Hence, the interests of the applicant are directly impacted by the ruling of the Second Circuit at issue in this petition for grant of a writ of certiorari.

Entities involved in providing public transportation have experienced an increasing volume of claims over the past decade from plaintiffs seeking to recover for emotional

distress. *See, e.g., Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994); *Atchison, Topeka & Santa Fe v. Buell,* 480 U.S. 557 (1987). This Court, in its opinion in *Gottshall,* placed sensible limitations on the right of employees to sue railroads for the negligent infliction of emotional distress, limitations that will be substantially eroded if the ruling of the court below in the instant case is permitted to stand.

The court below clearly was influenced in its ruling by the allegations of grievous misconduct made by the plaintiff-respondent against the defendant-petitioner. The Port Authority wishes to appear as *amicus curiae,* however, to press home the point that the court below has resolved what it saw as a "hard case" in a way that will have a punitive effect on all potential defendants in FELA cases, including the Port Authority, and will result in a flood of litigation and damage demands of incalculable magnitude.

The Port Authority believes that, if permitted to file its brief, it can assist the Court in understanding the full ramifications of the decision in this case and the range of actors and actions that will feel its baleful effects.

For these reasons, it asks that leave to file the attached *amicus curiae* brief be granted.

Respectfully submitted,

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September 30, 1996

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INTEREST OF THE *AMICUS*

The Port Authority of New York and New Jersey ("Port Authority") is a body corporate and politic created in 1921 by a Congressionally-consented-to compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws Ch. 151 and 1921 N.Y. Laws Ch. 154. The Compact is codified at N.Y. Unconsol. Law §§6401-23 (McKinney 1979). At the present time, pursuant to the 1921 Compact, and subsequent bi-State legislation, the Port Authority owns and/or operates thirty-three (33) such facilities, including, through its wholly-owned subsidiary, the PATH interstate railway system. N.Y. Unconsol. §6612 (McKinney 1979).

The operation of the PATH system is regarded as an essential governmental function for the benefit of the people of New York and New Jersey. N.Y. Unconsol. §6610 (McKinney 1979). Through its operation of the PATH system, the Port Authority is often a defendant in cases brought pursuant to the statute at issue, the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51. Hence, the interests of the *Amicus* are directly affected by the ruling of the Second Circuit at issue in the instant case.

The Port Authority is particularly concerned about the impact on it, and on other similarly situated companies and public authorities, of the kind of vague and open-ended liability imposed on rail operators by the Second Circuit. If a worker who suffers no physical injury can nevertheless recover for the negligent infliction of emotional distress under FELA simply and solely because the plaintiff was negligently exposed to pollutants or toxic substances in the workplace, railroads will be faced with a vastly expanded,

possibly devastating, potential tort liability. *Amicus* asserts that the result upsets the carefully crafted remedial scheme that FELA represents, and undoes the limitations on recovery for emotional distress inherent in that scheme that were set out by this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994).

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

FELA has a broad remedial purpose, and it is appropriate to interpret it liberally. The Second Circuit, however, has exceeded the liberality of Congress and ignored the admonitions of this Court by establishing a "physical impact" rule that would permit plaintiffs negligently exposed to asbestos to sue for emotional distress. The ruling is punitive rather than compensatory in its intent and effect. It also creates a conflict among the Circuits. Furthermore, the Second Circuit's holding that medical monitoring awards are permissible violates the statutory language of FELA, limiting recovery to cases of actual injury. In short, the ruling below was designed to address an unusual set of allegations, but did so in a way that has broad and unfortunate implications for the entire railroad industry. For this reason, certiorari should be granted and the holding subjected to careful review by the Supreme Court.

ARGUMENT

I. THE COURT BELOW HAS ADOPTED A RULE OF LAW GOVERNING THE NEGLIGENT INFLICTION OF EMOTIONAL HARM IN FELA CASES THAT IS INCONSISTENT WITH THIS COURT'S INTERPRETATION OF THE STATUTE, IN CONFLICT WITH THE LAW OF OTHER CIRCUITS, AND THAT IGNORES THE NEED TO TAKE INTO ACCOUNT NOT ONLY THE PLAINTIFF'S INTERESTS, BUT ALSO THE DEFENDANT'S LEGITIMATE NEED FOR PROTECTION AGAINST FRIVOLOUS SUITS AND UNPREDICTABLE AND OPEN-ENDED LIABILITY

In the decision below in *Buckley v. Metro-North Commuter Railroad,* 79 F.3d 1337 (2d Cir. 1996), the Court of Appeals for the Second Circuit ruled that a plaintiff suing under FELA may recover for emotional distress and medical monitoring if he or she has been "physically impacted" by asbestos fibers, even though the plaintiff has not developed, and, fortunately, as statistics indicate, probably never will develop, any disease as a consequence of that exposure. *Amicus* respectfully submits that this reading of the law ignores precedent established by this Court, creates a conflict with the law in other Circuits, is inconsistent with the common law, and poses a serious economic threat to all rail operators subject to FELA. For these reasons, it stands in urgent need of further appellate review.

Claims of negligent infliction of emotional distress are recognized as compensable in modern tort law, but not without, at the same time, generating considerable anxiety

about the potential for serious mischief that would be posed if the right to recover for this tort were too broadly defined. As this Court observed in *Gottshall*, 114 S.Ct. at 2405, claims for emotional distress divorced from physical injury pose risks both of fraud and of the trivialization of the legal process through the proliferation of insignificant disputes. Even more serious is the risk that "allowing such suits can lead to unpredictable and nearly infinite liability for defendants." *Id.* at 2408. In light of these concerns, and in an effort to remain faithful to the intent of Congress in enacting FELA -- "to provide compensation for the injuries and deaths caused by the *physical* dangers of railroad work," *id.* at 2410 (emphasis added) -- this Court limited recovery under the Act for emotional distress to those plaintiffs who could show that they fell within a "zone of danger," i.e., that they were threatened with imminent physical peril. *Id.*

The imposition of this limitation frankly recognizes that even individuals who indisputably have suffered serious, palpable emotional scarring as a result of negligence may nonetheless be barred from any remedy because their situation does not place them within a narrowly delimited class of permissible claimants. Although the result can be harsh toward some plaintiffs, this Court noted in *Gottshall* that it was required to reach such a result by the need to balance the interests of plaintiffs and defendants in a way that respects the objectives of Congress in enacting FELA. *Id.* Similarly, the state courts, operating under common law, have recognized that the need for predictability and a reasonable restriction on the scope of potential liability demands that this cause of action be carefully limited -- despite the fact that some convincing claims of harm will be left without redress. *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989); *Bovsun v. Sanperi*, 461 N.E.2d 843, 847 (N.Y.

1984); *Boucher v. Dixie Med. Ctr.*, 850 P.2d 1179, 1182 (Utah 1992).

Unfortunately, in deciding *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337 (2d Cir. 1996), the Second Circuit forsook the mandate of this Court, and abandoned the effort to keep liability under FELA for negligent infliction of emotional distress within reasonable bounds. In doing so, the court below specifically rejected contrary holdings from other circuits, *see Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) (inhalation of asbestos fibers is not an injury for purposes of FELA); *Amendola v. Kansas City S. Ry.*, 699 F. Supp. 1401, 1403 n. 3, 1410-11 (W.D. Mo. 1988) (same). As a result, entities such as the *Amicus* may face wholly incalculable levels of future liability unless this Court grants the instant petition for certiorari and corrects the Second Circuit's error.

If the Second Circuit's ruling stands, any defendant who is found inadvertently but negligently to have allowed its employees to be exposed to a harmful pollutant or toxic substance, such as asbestos, is likely to be liable to each and every person so exposed for emotional harm and for medical monitoring. Clearly, under the Second Circuit formulation, recovery will not even be limited to cases in which there is a showing of severe distress; the court below was quite willing to allow a plaintiff with "injuries" like the Respondent's to recover, even though the court openly concedes that the "evidence of Buckley's emotional distress is not overwhelming." *Buckley*, 79 F.3d at 1346.

II. THE COURT BELOW REACHED A WRONG AND PUNITIVE RESULT

In truth, what seems to have motivated the court to reach its conclusion on the applicable legal standard is not some basic disagreement with the proposition that a tort like the negligent infliction of emotional distress needs carefully and narrowly defined boundaries. Rather, it seems to have occurred as a result of the court's reaction to the plaintiff's allegations of egregious wrongdoing on the part of his employer. The court describes the plaintiff as emerging from the steam tunnels under Grand Central Station day after day so covered with white asbestos dust that he and his co-workers were dubbed the "snowmen of Grand Central." *Id.* at 1340. *Buckley* is described as "an unusual case," an exposure to asbestos that was "massive, lengthy, and tangible," and furthermore, the allegations are that this exposure occurred with the knowledge of Metro-North and without any prior warning to the workers. *Id.* at 1340, 1345. Indeed, the court was sufficiently upset by these allegations that it openly acknowledged being unmoved by the possibility that its holding could lead to a "flood of litigation." *Id.* at 1345.

It is the sense of outrage conveyed by the opinion below that most compellingly argues for review by the Supreme Court. However distasteful the picture of the defendant's behavior, as presented in the opinion below, it should be remembered that, in reality, the facts of the case have yet to be determined. No ultimate findings of fact exist because the District Court directed a verdict for the defendant at the close of the plaintiff's case. *Buckley v. Metro-North Commuter Railroad*, No. 89 Civ. 7170-A (WK), 1995 WL 110380 (S.D.N.Y. March 15, 1995). And most importantly,

no issue of liability or damages based on any claim of intentional wrongdoing was before the Second Circuit. On the contrary, the sole issue the panel was asked to address was whether, based on simple negligence, a defendant could be required to compensate its employees for emotional distress and medical monitoring if they are exposed to asbestos at some indeterminate level above normal background amounts. *See Buckley*, 79 F.3d at 1344.

Amicus curiae wishes to point out that instead of limiting itself to the narrow issue legitimately before it, the court below seems to have allowed its view of the defendant's conduct to support a vast departure from and distortion of the traditional principles of tort law. The holding that workplace exposure to asbestos constitutes a physical impact sufficient to sustain a claim of negligent infliction of emotional distress serves the purpose of punishing Metro-North rather than compensating the plaintiff. After all, plaintiff complains of no physical injury, can offer no evidence of clinical disease, and does not claim severe emotional distress. The court itself admitted that the evidence of plaintiff's emotional distress was "slim." *Id.* at 1346.

III. EVEN IF THIS COURT WERE TO AFFIRM THE HOLDING OF THE SECOND CIRCUIT WITH REGARD TO ITS "PHYSICAL IMPACT" STANDARD FOR IMPOSITION OF LIABILITY IN CASES OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, RECOVERY FOR MEDICAL MONITORING WOULD NONETHELESS BE INAPPROPRIATE

The Court would perform an important service to entities in the position of *Amicus* by reviewing the holding below with regard to future medical monitoring.

Compensation for medical monitoring is not a remedy for a claim of existing emotional distress. It is intended to deal with a different issue: the risk that a physical ailment will develop at a future date. But because the disease does not exist at the time of the suit, requiring railroads to compensate workers for ongoing monitoring is incompatible with the statutory requirement of FELA that a plaintiff be permitted to recover only for actual injuries.

Luckily, most exposures to harmful or toxic substances in the workplace and elsewhere will never result in the development of disease in most people. And in the case of those unfortunate enough to suffer adverse consequences, the expression of the illness may not occur -- as has been the experience with asbestos -- until decades after the time of exposure. If employers governed by FELA are required to pay for future medical monitoring for every employee who stands even a remote chance of developing an illness related to workplace exposure, employers will become the suppliers of regular medical checkups for vast numbers

of present and past employees at an astronomical potential cost. This Court said clearly in *Gottshall*:

> That FELA is to be liberally construed . . . does not mean that it is a workers' compensation statute. We have insisted that FELA "does not make the employer the insurer of the safety of his employees . . . ."

114 S.Ct. at 2404 (citation omitted). The rule enunciated by the lower court would go well beyond what concerned this Court in *Gottshall*. It would, in effect, turn the employer into a medical insurer.

Workers' compensation laws do not go as far as the Second Circuit insists that FELA should. And certainly the common law of torts generally has not demanded that employers engage in medical monitoring -- particularly in cases where the plaintiff has, as his experts testified here, at most a five (5) per cent risk of ever developing an asbestos-related disease. *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1356 (S.D.W.Va. 1990), *aff'd*, 958 F.2d 36, 38 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992). Were this to become a generally accepted proposition, not only would employers like *Amicus* face bankrupting costs; the court system itself would collapse under the weight of the ensuing levels of litigation.

CONCLUSION

In light of the importance of the issues, and for all the reasons set forth in this brief, *Amicus Curiae* respectfully urges the Court to grant the petition for a writ of certiorari and to review the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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